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CASES CITED

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 718

EDWARD F. GOLTRA, PETITIONER

v.

JOHN W. WEEKS, SECRETARY OF WAR OF THE
United States, Col. T. Q. Ashburn, Chief Inland
& Coastwise Waterways Service of the United
States, and James E. Carroll, United States Dis-
trict Attorney, respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH
CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS OF THE LOWER COURT

The transcript of record contains no opinion by the District Court, but the brief in support of this application (p. 29) contains the oral opinion of the Court (Faris, D. J.), overruling the Government's motion to set aside a mandatory injunction which it had entered and to dismiss the bill. The opin-

ions of the Circuit Court of Appeals have not been officially reported. However, the majority opinions (Pollock, D. J., Symes, D. J.) reversing the orders and decree of the District Court will be found on pages 105-131 of the transcript of record. The dissenting opinion (Sanborn, C. J.) appears at page 131. For convenience, the majority opinions appear as an appendix to this brief (pp. 9, 38).

On June 4, 1923, the Government made application to this Court for leave to file its petition for writ of prohibition and/or mandamus restraining the Honorable Charles B. Faris, Judge of the District Court, from asserting and exercising jurisdiction over such suit and proceedings. (No. 23, Original, October Term 1923.) This Court denied the application, stating the proper remedy to be by appeal to the United States Circuit Court of Appeals. (*Ex parte in the Matter of the United States as Owner of Nineteen Barges and Four Towboats, Petitioner*, 263 U. S. 389.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 23, 1925, and the present application made September 2, 1925. The reasons upon which petitioner relies for the allowance of a writ of certiorari are set forth on pages 3-5 of his petition. Jurisdiction to issue the writ is conferred upon this Court by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. (43 Stat. 936, c 229.)

STATEMENT

We adopt the review of the facts stated by the majority opinion of the Court (Pollock, D. J.), which are made an appendix to this brief. (Infra p. 9.) Substantially the same review was made by the Government's petition and supporting brief for the writ of prohibition filed in this Court. (No. 13 Original, October Term 1923.) The substantial questions involved are (a) whether this suit is one against the United States, and (b) whether the District Court had authority to review the discretion and judgment of the Secretary of War in declaring the conditions of the lease for the vessels in dispute violated and to cancel the lease. The majority opinion of the Circuit Court of Appeals has answered the first question in the affirmative and the second in the negative.

The present application assigns these reasons why the judgment of that court should be reviewed by this Court:

(1) That the majority decision of the Circuit Court of Appeals is in conflict with applicable decisions of this Court and in conflict with the weight of authority.

(2) The majority opinion has decided an important question of law in a way untenable and in conflict with the Fifth Amendment of the Constitution of the United States.

(3) The majority opinion has decided important questions of Federal law which should be settled by this Court.

Our view is that there is no occasion in this case for the review of the decision of the Circuit Court of Appeals by certiorari or otherwise. There is no conflict in the decisions of the various Circuit Courts of Appeals, nor is the majority decisions in conflict with the decisions of this Court. The questions suggested are not of general interest except to the immediate parties to the litigation.

ARGUMENT

This Court in the prohibition proceedings has clearly indicated that the questions which this litigation suggests were questions to be considered by the Circuit Court of Appeals in the usual manner. (*In the Matter of the United States as Owner of Nineteen Barges and Four Towboats*, 263 U. S. 389.) While the question as to whether a suit, although nominally not against the United States, is so in effect and consequence, has been variously decided, yet it has been so decided upon consideration of distinctly different sets of facts, definite principles controlling according to the facts. When the decisions of this Court are analyzed, there is no real substantial conflict in them. The principles to be applied have been clearly laid down and long settled. The facts in the recent case of *Wells v. Roper*, 246 U. S. 335, are so in line with the facts in this case and the principles of decision as applied to such facts are so clearly announced that it is difficult to understand how it could be contended that this Court could arrive at a different conclu-

sion without overruling that case, which it is not asked to do. We adopt the review of the cases and the conclusions of the majority opinions of the Circuit Court of Appeals as our argument. (Appendix pp. 9-45.)

The contract in question clearly reserved to the Government the right to rescind the contract in the exercise of the judgment and discretion of its executive official. It is difficult to understand how it can be seriously contended that this exercise of judgment and discretion of this official can be judicially reviewed, in view of the long line of cases denying such a review.

We see no soundness in the suggestion and argument that because the Government of the United States made this contract for the lease of the boats to the petitioner it has divested itself of its sovereignty insofar as the contract is concerned. The Government in making this contract and in all its dealings with these boats was acting as a sovereign. Under the obligation of prosecuting the war, the Government, through its executive department, caused the boats in question to be built for war purposes. When the war ended, acting in the same capacity, it undertook to make disposition of this war material for which it no longer had such use. It did not do this through any corporation created by it or through other authority. It was not a stockholder in any corporation, as in the case of *Bank of United States v. Planters Bank of Georgia* (9 Wheat. 904) and like cases. That case decided

that because the State happened to be a stockholder in a bank that fact did not confer upon the bank immunity from suit possessed by the State. The stockholders of a corporation have no identity with the corporation itself.

The Secretary of War was justified in cancelling the contract with Goltra. Very slight limitations were placed upon the character of commodity to be carried by the vessels. The public purpose to be served was providing adequate transportation by the operation of the boats as common carriers in service on the Mississippi River. The contract reserved to the Secretary of War the right to fix the rates, and the rates granted were the same as those of the Mississippi Warrior Service, with the exception of one or two commodities as to which there were inadequate facilities for handling at New Orleans. The petitioner made two slight movements of freight while possessed of these boats. The employment of the boats as common carriers serving the public was one of the substantial considerations moving the Government to enter into the contract. Without their use in service by the petitioner the Government could receive no payment for them. Without their use the community could receive no benefit from them. But, waiving these considerations, the executive officer of the Government exercised his judgment and discretion, and, having exercised it, whether he exercised it correctly or incorrectly, is not a matter for the review and determination of the courts.

The majority opinions of the Circuit Court of Appeals fully and clearly review the two substantial questions which the record presents. These opinions appear as an appendix to this brief.

CONCLUSION

It is respectfully submitted that this application should be denied.

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J. FRANK STALEY,
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SEPTEMBER, 1925.

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